Sunrise Megaway Sdn Bhd (in liquidation) v Kathryn Ma Wai Fong

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(A)-1078–06 OF 2019
KAMALUDIN MD SAID, HADHARIAH ISMAIL AND GUNALAN MUNIANDY JJCA
18 MARCH 2021

Companies and Corporations — Winding up — Proof of debts — High Court allowed respondent's motion to reverse appellant's liquidator in admitting proof of debt — Appellant appealed against High Court's decision — Whether High Court failed to judicially appreciate or to draw proper inferences from documentary evidence — Whether High Court failed to take into account relevant considerations which appellant's liquidator had taken in admitting proof of debt — Whether High Court failed to judicially appreciate evidence to prove respondent's indebtedness — Whether respondent failed to meet threshold test by failing to produce any contemporaneous evidence to contrary in High Court

The appellant appealed against the decision of the High Court which allowed the respondent's motion to reverse the decision of appellant's liquidator in admitting the proof of debt submitted by Lismore Trading Sdn Bhd. On 28 May 2018, the appellant was wound up by the winding up court ('the winding up order') pursuant to winding up petition filed by the petitioner. Upon the winding up order, Mr Wong Ching Yong was appointed as the liquidator. The petitioner was the executrix of the estate of the late Datuk Wong Kie Nai who held 80,000 ordinary shares in the appellant. As one of the creditors and part of the WTK Group, Lismore Trading Co Ltd ('Lismore') had lodged a proof of debt for a sum of RM4,018,389.88 through Messrs Huang & Company Advocates. The liquidator admitted Lismore's proof of debt through a notice of admission. The respondent filed encl 1 to oppose the admission of Lismore POD by the liquidator. The appellant's case was that the High Court's decision should be reversed because of: (a) the High Court failed to judicially appreciate or to draw proper inferences from the documentary evidence produced before it; (b) the High Court failed to take into account relevant considerations which the appellant's liquidator had taken in admitting Lismore's proof of debt; (c) the High Court failed to judicially appreciate Madam Loh Leh Fong's evidence; and (d) the respondent failed to meet the threshold test by failing to produce any contemporaneous evidence to the contrary in the High Court.

Held, allowing appeal and setting aside High Court's decision:

(1) It was not for the court to determine how the investigation was to be done or carried out by the liquidator and the relevancy and adequacy of the documents to be considered in the investigation before making the finding and decision as otherwise, the court would be seen as usurping the function of the liquidator or interfering with the conduct or decision of the liquidator in discharging his role and functions in company liquidation. The matter was within the statutory powers of the liquidator unless the liquidator failed to carry out investigations or the liquidator's conduct was so unreasonable and absurd that no reasonable person would so acted or had acted in bad faith. The liquidator did his investigations on Lismore's proof of debt based on the documents relied on him. The High Court judge failed to appreciate all the said documentary evidence (see para 30).

(2) The court's finding that there was no proof to show that the monies were received from Lismore and that the proof of debt was unsubstantiated. The claim could not be sustained as there was insufficient documentary evidence to back up the claim of advance monies done by Lismore which was based on a misunderstanding of facts and evidence adduced before, which led the court to come to a conclusion contrary to solid contemporaneous documentary evidence. It was of the considered view that the High Court judge was wrong in the findings that the appellant's liquidator had ignored the fact that there were lack of supporting documents and that there was a failure on the part of the liquidator to ascertain the Lismore's claim (see paras 34 & 39).

(3) The claim saying that the respondent was indebted to Lismore was entirely questionable and not reliable. The learned judge failed to appreciate the evidence provided by Madam Loh on the practices of the appellant, Lismore and Artic Start as part of the WRK Group of companies. The finding by the High Court judge that Madam Loh evidence was entirely questionable and not reliable was without basis (see para 45).

(4) The court agreed with the appellant's submission that the learned High Court judge did not make any specific findings to support the decision that the appellant's liquidator was wrong to admit Lismore's proof of debt, the reason was that the respondent adduced no evidence to contradict the appellant's contemporaneous documentary evidence. The learned High Court judge ought not to have interfered with the decision of appellant liquidator insofar as Lismore's POD was concerned. In the absence of evidence of fraud or bad faith, there was simply no reason for the learned judge to find that the appellant's liquidator had acted in a manner that was so utterly unreasonable and absurd that no reasonable man would have done it (see paras 49 & 53).

[Bahasa Malaysia summary

Perayu merayu terhadap keputusan Mahkamah Tinggi yang membenarkan usul responden untuk mengakas keputusan pelikuidasi perayu dalam mengakui bukti keberhutangan yang dikemukakan oleh Lismore Trading Sdn Bhd. Pada 28 Mei 2018, perayu digulung oleh mahkamah penggulungan ('perintah penggulungan tersebut') berdasarkan petisyen penggulungan yang difailkan oleh pemohon. Berdasarkan perintah penggulungan tersebut, Encik Wong Ching Yong telah dilantik sebagai pelikuidasi. Pempetisyen adalah wasi harta pusaka mendiang Datuk Wong Kie Nai yang memegang 80,000 saham biasa dalam perayu. Sebagai salah satu pemiutang dan sebahagian daripada WTK Group, Lismore Trading Co Ltd ('Lismore') telah mengemukakan bukti keberhutangan dalam jumlah RM4,018,389.88 melalui Tetuan Huang & Company Advocates. Pelikuidasi mengakui bukti keberhutangan Lismore melalui notis penerimaan. Responden memfailkan lampiran 1 untuk menentang mengemukaan POD Lismore oleh pelikuidasi. Kes perayu adalah bahawa keputusan Mahkamah Tinggi harus diakas kerana: (a) Mahkamah Tinggi gagal menilai secara kehakiman atau membuat kesimpulan yang wajar dari keterangan-keterangan dokumentari yang dikemukakan dihadapannya; (b) Mahkamah Tinggi gagal untuk mengambilkira pertimbangan yang wajar yang telah diambil oleh pelikuidasi perayu dalam mengakui bukti keberhutangan Lismore; (c) Mahkamah Tinggi gagal menilai secara kehakiman bukti keterangan Puan Loh Leh Fong; dan (d) responden gagal memenuhi ujian had ambang dengan tidak mengemukakan keterangan yang ada secara bertentangan di Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Ianya bukanlah bagi mahkamah untuk menentukan bagaimana siasatan tersebut harus dijalankan atau dilakukan oleh pelikuidasi dan kewajaran dan kecukupan dokumen yang harus dipertimbangkan dalam siasatan sebelum membuat dapatan dan keputusan sebaliknya, mahkamah akan dilihat sebagai merebut fungsi pelikuidasi atau mengganggu tindakan atau keputusan pelikuidasi dalam melaksanakan peranan dan fungsinya dalam penggulungan syarikat. Perkara tersebut berada dalam kuasa undang-undang pelikuidasi melainkan sekiranya pelikuidasi gagal menjalankan siasatan atau tindakan pelikuidasi tersebut sangat tidak wajat dan tidak masuk akal sehingga tidak ada orang yang munasabah yang bertindak demikian atau berniat curang. Pelikuidasi melakukan siasatannya atas bukti keberhutangan Lismore berdasarkan dokumen yang dikemukakan kepadanya. Hakim Mahkamah Tinggi gagal menghargai semua kesemua keterangan dokumentari tersebut (lihat perenggan 30).

(2) Dapatan mahkamah bahawa tidak ada bukti yang menunjukkan bahawa

wang tersebut diterima dari Lismore dan bukti keberhutangan adalah tidak berasas. Tuntutan itu tidak dapat dipertahankan kerana tidak ada keterangan dokumentari yang mencukupi untuk menyokong tuntutan wang pendahuluan yang dibuat oleh Lismore berdasarkan kepada salah faham fakta dan keterangan yang dikemukakan dihadapannya, yang menyebabkan mahkamah membuat kesimpulan yang bertentangan dengan keterangan dokumentari sedia ada yang mantap. Ianya adalah berdasarakan pandangan bahawa hakim Mahkamah Tinggi terkhilaf dalam dapatan bahawa pelikuidasi perayu telah mengabaikan kenyataan bahawa kekurangan dokumen sokongan dan terdapat kegagalan pihak pelikuidasi untuk menaksirkan tuntutan Lismore (lihat perenggan 34 & 39).

(3) Tuntutan yang mengatakan bahawa responden berhutang kepada Lismore sepenuhnya dipersoalkan dan tidak boleh dipercayai. Hakim yang bijaksana gagal menghargai keterangan yang dikemukakan oleh Puan Loh mengenai amalan perayu, Lismore dan Artic Start sebagai sebahagian daripada syarikat WRK Group. Dapatan oleh hakim Mahkamah Tinggi bahawa keterangan Puan Loh sepenuhnya boleh dipersoalkan dan tidak boleh dipercayai adalah tanpa sebarang asas (lihat perenggan 45).

(4) Mahkamah bersetuju dengan hujahan perayu bahawa hakim Mahkamah Tinggi yang bijaksana tidak membuat dapatan khusus untuk menyokong keputusan bahawa pelikuidasi perayu telah salah untuk mengakui bukti keberhutangan Lismore, alasannya adalah bahawa responden tidak mengemukakan bukti untuk menyangkal keterangan dokumentari sedia ada perayu. Hakim Mahkamah Tinggi yang bijaksana seharusnya tidak mengganggu keputusan pelikuidasi perayu dalam hal POD Lismore. Sekiranya tidak ada keterangan penipuan atau niat curang, tidak ada alasan bagi hakim yang bijaksana untuk mendapati bahawa pelikuidasi perayu telah bertindak dengan cara yang tidak wajar dan tidak masuk akal sehingga tidak ada orang yang masuk akal akan melakukannya (lihat perenggan 49 & 53).]

Cases referred to

Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor [2007] 2 MLJ 12, CA (refd)

Barnden (Liquidator), Re Masonry Works Pty Ltd (in liq) [2020] FCA 575, FC (folld)

Edennote Ltd, Re; Tottenham Hotspur plc and others v Ryman and another [1995] 2 BCLC 248, Ch D (refd)

Equity Funds of Australia (in liq), Re (1976) 2 ACLR 238, SC (refd)

Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd [2009] 4 SLR 458, CA (folld)

Lim Chiew v Lee Chao Yong & Anor and another appeal [2018] MLJU 956, CA (refd)
Tan Kim Tian & Anor v Tan Kim Chuan & Anor [2020] MLJU 86, CA (refd)
Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709, FC (refd)
Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor [2013] 2 MLJ 629, FC (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 rr 91, r 92, 93, 98
Companies Act 1965 ss 279, 291(1), Form 59

Appeal from: Post Winding-Up and Company Winding-Up Nos BA-28PW-150–11 of 2018 and BA-28NCC-462–10 of 2016 (High Court, Shah Alam)

Gopal Sri Ram (Wong Rhen Yen, Gary Ng Cheng Yip, Lee Min Lun and How Li Nee with him) (Dennis Nik & Wong) for the appellant.
Kelvin Seet Wan Nam (Dennis Yuean Jin Han with him) (Chooi & Company) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] The appellant appeals against the decision of the High Court which allowed the respondent's motion to reverse the decision of the appellant's liquidator in admitting the proof of debt submitted by Lismore Trading Sdn Bhd.

BRIEF FACTS

[2] The appellant is a company within WTK group of companies in the business of extraction and sale of logs. On 28 May 2018 the appellant was wound up by the winding up court ('winding up order') pursuant to a winding up petition filed by the petitioner. Upon the winding up order, Mr Wong Ching Yong was appointed as the liquidator. The petitioner is the executrix of the estate of the late Datuk Wong Kie Nai ('WKN') and she holds 80,000 ordinary shares in the appellant.

[3] As one of the creditors and part of the WTK Group, Lismore Trading Co Ltd ('Lismore') had on 27 August 2018 lodged a proof of debt ('POD') for a sum of RM4,018,389.88 through Messrs Huang & Company Advocates. The liquidator admitted Lismore POD through a notice of admission dated

A 1 November 2018. On 22 November 2018, the respondent filed encl 1 to oppose the admission of Lismore POD by the liquidator.

B **[4]** After hearing the respondent's motion and the appellant's replies and having considered the arguments, the learned High Court judge was inclined to agree with the respondent, hence, allowed the said motion to reverse the decision of the appellant's liquidator in admitting the Lismore POD.

THE APPEAL

C **[5]** We heard oral submissions from Datuk Sri Gopal Sri Ram on behalf of the appellant and Mr Kelvin Seet Wan Nam for the respondent. Counsels are also relying on their written submissions.

D **[6]** In essence, the appellant's case is that the High Court's decision should be reversed based on four reasons as follows:

(a) the High Court failed to judicially appreciate and/or to draw proper inferences from the documentary evidence produced before it;

E (b) the High Court failed to take into account relevant considerations which the appellant's liquidator had taken in admitting Lismore's POD;

(c) the High Court failed to judicially appreciate Madam Loh Leh Fong's evidence; and

F (d) the respondent failed to meet the threshold test by failing to produce any contemporaneous evidence to the contrary in the High Court.

G **[7]** There are several authorities referred to by the appellant and most importantly, the principle of law expounded by the Federal Court in *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629, which set out the threshold test that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person H would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator.

I **[8]** In the present case, the liquidator has taken into account relevant considerations before admitting Lismore's POD. Counsel for the appellant submitted that the liquidator's conduct cannot be held as so unreasonable and absurd that no reasonable person would have acted in that way. In the circumstances, the learned High Court judge has committed a serious error of law and misdirected himself. This court was urged to intervene to correct the decision and it was prayed that the appeal be allowed.

[9] The respondent argued that those reasons given by the appellant's counsel are without merit. The respondent says that the High Court's decision is correct by reason that from the liquidator's purported examination of the POD it is palpable that the claim in the POD is questionable and doubtful. The POD submitted by Lismore is essentially a bare claim not substantiated with supporting documents and/or any sufficient documentary proof. The liquidator has failed to take into account any of the above important considerations before admitting the POD. This failure makes his decision unsustainable. The bank statement purportedly shown by Lismore also does not show that the sums were received by the appellant. Madam Loh Leh Fong @ Loh Leh Pong Fong is not in a position to speak on behalf of Lismore because she is neither an officer of Lismore nor the person responsible for the accounts and finance of Lismore. Madam Loh Leh Fong @ Loh Leh Pong Fong's evidence that the appellant is in fact indebted to Lismore is not a reliable evidence. The liquidator has admitted Lismore's POD without proper reasons and justification. Hence, the decision is correct. The respondent pray that the appeal ought to be dismissed.

[10] After hearing the oral submissions from the appellant's and the respondent's counsel and having read the records of appeals and the grounds of judgment of the learned judge and considered the arguments advanced in the submissions, we are satisfied that based on the principles of law and the authorities cited to us that the High Court had erred in law and fact in interfering with the act or decision of the liquidator in admitting the proof of debt by Lismore Trading Co Ltd.

[11] The High Court judge had failed to duly and judicially appreciate the totality of evidence and had wrongly concluded the decision of the liquidator was so unreasonable and absurd that no reasonable person would have acted in that way.

[12] We agree with the appellant's contention that in view of the evidence as a whole before the High Court, the liquidator has satisfactorily and adequately performed his statutory role and function by considering all the evidence, particularly the unchallenged documentary evidence and came to a decision that was reasonable and justified under the circumstances relating to the admission of the impugned POD.

[13] We, therefore, find appealable errors by the High Court judge that warrant appellate intervention. Accordingly, our unanimous decision is to allow the appellant's appeal with costs and set aside decision of the High Court. The decision of the liquidator is reinstated.

[14] We provide our reasons.

A THE LAW

[15] In the notice of motion, the respondent sought to reverse the liquidator's decision in admitting the Lismore's POD. The application is made under section 517 of the Companies Act, 2016 (previously s 279 of the Companies Act 1965 and/or rr 91, 93 and 98 of the Companies (Winding-Up) Rules 1972.

[16] Section 279 of the Companies Act 1965 allows the respondent being a person aggrieved by any act or decision of the liquidator to appeal against such decision of the liquidator to the court. The court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

[17] Section 291(1) of the Companies Act 1965, provides that all debts payable on a contingency and all claims against the company present or future shall be admissible to proof against the company.

[18] By r 92 of the Companies (Winding–Up) Rules 1972 the liquidator shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in Form 59 to the creditor the grounds of the rejection.

[19] The Federal Court in *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629, approved the decision of the Court of Appeal in *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor* [2007] 2 MLJ 12 and held that that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator.

[20] More recently, the Court of Appeal in *Lim Chiew v Lee Chao Yong & Anor and another appeal* [2018] MLJU 956, had reaffirmed the position of law on the test to be applied under s 279 of the Companies Act 1965 following *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor*, the Federal Court in affirming the decision in *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor*. In this case, at para 52, the learned High Court judge found that she had to interfere with the exercise of the liquidator's decision based on the following grounds:

(a) the liquidator did not address himself to the correct questions;

(b) the liquidator has made errors of law; and

(c) the liquidator has taken into consideration entirely irrelevant considerations.

On appeal, the Court of Appeal held that the liquidator's conduct did not fall into any of the specified grounds from (a), (b) and (c) as cited by the learned judge in para 52 above. The court does not think that it could be said that the conduct of the liquidator was so unreasonable and absurd that no reasonable person would have so acted. Our decision was arrived based on the settled principles that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation unless shown that no reasonable person would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator.

[21] With the established and entrenched legal principles cited above, we have to determine whether the High Court was justified in interfering with the conduct or decision of the liquidator in discharging his role in company liquidation (the appellant) or whether the act or decision of the liquidator is so unreasonable and absurb that no reasonable person would have acted in that way or whether the liquidator failed to address the right questions or at all or to consider relevant matters in admitting the POD (Lismore's POD).

THE HIGH COURT'S DECISION

[22] The learned High Court judge had referred to the relevant laws applicable to deal with the liquidator's act or decision in discharging his roles in company liquidation for guidance.

[23] In allowing the respondent's motion and reversing the appellant's liquidator decision in admitting Lismore POD, the High Court gave its reasons as follows:

(2) The POD is unsubstantiated and the claim cannot be sustained as there were insufficient documentary evidence to back up the claim that Lismore had advanced the sum of RM4,018,398.88 to the respondent. To me, the liquidator should not have ignored the fact that there were lack of supporting documents. The failure on the part of the liquidator to ascertain the genuineness of Lismore's claim (due to the non-production of material documents by Lismore) clearly shows that he had wrongly exercised his discretion to admit Lismore's POD.

(3) Loh Leh Fong @ Loh Leh Pong in her affidavit affirmed on 3/1/2019 said that she is the Financial Controller of WTK Management Services Sdn Bhd. Her job is to oversee the account and finances of a few companies under the WTK group of companies which include the respondent. Prior to the admission of Lismore's Proof of Debt on 1/11/2018, the liquidator had called her for interviews and examination few times regarding the said POD at his office. Finally, Loh Leh Fong she believe that the respondent is indebted to Lismore in the sum of RM4,018,389.88 based on

the fact that Lismore had advanced by way of telegraphic transfer from Singapore several times to respondent RHB Bank's account in Malaysia between 21/10/2011 to 22/12/2011 for the purpose of disbursing the advances money to Artic Star. Then, after receiving the money, respondent would disbursed the funds to Artic Star by way of cheque. There were altogether twelve (12) cheque issued in the sum of RM4,018,389.88. All such payment were duly acknowledged receipt by Artic Star with official receipts issued to the respondent.

(4) The affidavits affirmed by the liquidator dated 3/1/2019 stated that as the POD of the respondent was already admitted by Artic Star, then the liquidator would then have to refund the same to Lismore as the money does not belong to the respondent. However, with regret, I cannot agree with the liquidator's argument. Based on the affidavit evidence of the parties, it can be clearly shown that Loh Leh Fong @ Loh Leh Pong is not the financial controller of Lismore nor was she responsible for the accounts and finance of Lismore. As such, the claim by her that the respondent is indebted to Lismore is entirely questionable and not reliable.

(5) According to Loh Leh Fong @ Loh Leh Pong affidavit at para 10(b) she was then informed by the late Datuk Wong Kie Nai that there will be few advances made from Lismore to Artic though the respondent. Lismore then advanced by way of telegraphic transfer from Singapore several times to the respondent's for the purpose of disbursing the advances money to Artic Star later. To me, if such kind of transaction is true, then the liquidator should have carried out more investigations by asking the said financial controller to provide the company's written resolution. More so when the sum involved is very substantial. Unfortunately, this was done by the liquidator. Neither was there any loan agreement produce by the financial controller to support their claims. Without all the material documentation proven in court, can it be said that the liquidator has exercised his discretion rightly in accepting Lismore's POD. In the absent of these relevant and important documents, I am in to hesitation to conclude that the liquidator has not exercised his discretion bona fide and he has acted in a way in which no reasonable liquidator would have acted. It is my considered view that the liquidator has made errors of law. He did not address the relevant questions. He has also failed to consider the relevant factors when admitting the POD which warranted this Court to interfere with the exercise of his decision.

Before concluding, there was one interesting point taken by the petitioner which I need to mention. Learned counsel for the petitioner argued that the series of alleged telegraphic transfer of money involved three companies ie Lismore, the respondent and Artic Star do not prove that Lismore advanced monies to Artic Star through the respondent. The monies transferred to the respondents could have well been repayment of amount owing by Lismore to the respondent. Moreover, it is odd that if indeed Lismore had wanted to advance monies through the respondent. This alleged advance arrangement does not make any commercially sense.

Furthermore, it was also contended by the petitioner that the respondent's Directors Report and Audited Financial Statements for the financial year ended 30 June 2012 (Exhibit KM-15, p 15) do not show that the respondent is indebted to Lismore for the sum RM4,018,389.88.

[24] In short, the High Court interfered with the liquidator's decision to admit Lismore POD for the reason that the liquidator had wrongly exercised his discretion by failing to ascertain the genuineness of Lismore's claim. Madam Loh Leh Fong @ Loh Leh Pong's evidence that the respondent is indebted to Lismore is entirely questionable and not reliable. The liquidator failed to carry out more investigations such as the production of the company's written resolution and loan agreement to support their claims and finally, the liquidator has not exercised his discretion bona fide but has acted in a way in which no reasonable liquidator would have acted. Therefore, the liquidator has made errors of law for failing to address the relevant questions.

OUR DECISION

[25] It is not disputed that in the grounds of judgment the learned High Court judge acknowledged the liquidator had relied on the following evidence in admitting Lismore POD. These documents were exhibited in the liquidator's affidavit and submitted before the court and the documents are as follows:

(a) Lismore's POD Lismore's bank statement;

(b) appellant's bank statement;

(c) appellant's POD to Artic Star;

(d) notice of dividend by Artic Star's liquidator (admission of the appellant's POD;

(e) the credit advice/swift message from RHB Bank Bhd;

(f) appellant's debtors ledger; and

(g) appellant's journal vouchers (see ACB, Tab 12, pp 92–93),

(collectively, 'the said documentary evidence')

[26] Despite all the evidence submitted by the appellant, the court held that for the advanced monies to and received by the appellant, there was no proof that can be shown that the money were received from Lismore. It is also held that the POD is unsubstantiated and the claim cannot be sustained as there were insufficient documentary evidence to back up the claim that Lismore had advanced the sum of RM4,018,398.88 to the respondent. Learned counsel for the appellant submitted that these findings were erroneous. There was sufficient contemporaneous documentary evidence to establish the money trail of RM4,018,398.88 advanced by Lismore to the appellant.

[27] The learned High Court judge dealt with the bank statement which shows that the sums of RM983,200, RM1,161,595, RM971,995 and

A RM901,599.88 were received by the respondent but held that there was no proof that can be shown that the monies were received from Lismore. These two documents were enclosed in the Lismore's POD Form dated 27 August 2018 which shows the total amount of RM4,018,398.88, ie, vide the Lismore's summary account dated 12 June 2018 and its statement of account from
B October 1 to October 31 2011.

[28] We agree with the learned High Court judge that admitting Lismore's POD based on the two documents merely on the face of them without further
C investigation is insufficient. Based on the two documents, the learned High Court judge went on to say that the liquidator should not have ignored the fact that there was a lack of supporting documents and the liquidator should ascertain the genuineness of Lismore's claim (due to the non-production of material documents by Lismore). His finding was that the liquidator had
D erroneously exercised his discretion to admit Lismore's POD.

[29] However, the learned High Court judge did not mention or address in his judgment what he meant by non-production of material documents. However, it can be understood that the learned High Court judge was referring
E to any loan agreement that should have been produced by the financial controller to support the claims and without all this material documentation admitted into evidence it cannot be said that the liquidator has exercised his discretion rightly in accepting Lismore's POD. The learned judge also found that the liquidator failed to carry out more investigations for production of the
F company's written resolution to support their claims.

[30] We did not agree with this finding simply because, in our view it is not for the court to determine how the investigation is to be done or carried out by the liquidator and the relevancy and adequacy of the documents to be
G considered in his investigation before he makes his finding and decision as otherwise, the court will be seen as usurping the function of the liquidator or interfering with the conduct or decision of the liquidator in discharging his role and function in company liquidation. The matter is within the statutory powers of the liquidator unless he had failed to carry out investigations or his
H conduct was so unreasonable and absurd that no reasonable person would so act or has acted in bad faith.

[31] The respondent argued that Lismore's purported POD was merely a bare claim containing a self-serving statement of account with nothing more.
I The POD is unsubstantiated with crucial supporting documents to prove that there was indeed a loan or advance agreement in place. There was no explanation whatsoever of the nature of the alleged debt in the purported POD. This casts serious doubts as to the genuineness of the POD. The learned judge has found that the liquidator failed to carry out more investigations.

[32] Lismore submitted its POD claim form on 27 August 2018 enclosing the summary statement of account and bank statement of account. The liquidator admitted Lismore's POD on 1 November 2018. Prior to the decision, the liquidator had a meeting on 1 October 2018 attended by the creditors, including the appellant and the respondent, to discuss the PODs received by the appellant. The respondent objected to Lismore's POD. The liquidator asked for 28 days to reply to all creditors on admission/rejection of the respective PODs permitted under the rule. The meeting unanimously agreed to form a committee of inspection (COI) of the PODs. Mr Danny Huang Dung Po the representative of Lismore and other creditors' representatives including the respondent were appointed as members of the COI. The liquidator had also requested the legal counsel to give a legal opinion on the time bar issue of the POD's claim. The decision to admit Lismore's POD was made within the 28 days from the time he received the POD.

[33] The liquidator in his affidavit dated 3 January 2019, stated that he obtained copies of both the Lismore's HSBC Bank statements (Singapore account) and the appellant's RHB Bank (Malaysia) bank statement in relation to the transactions in issue. There are also other documents exhibited in the affidavit referred by him. Beyond that, the liquidator had interviewed Madam Helen Loh during examination of Lismore's POD. By the explanation and the documents in the liquidator's affidavit, we are satisfied that based on the documentary evidence, his investigation reveals that the bank statements and credit notes tally with the accounting records of the appellant. The relevant transactions between Lismore, the appellant and Artic Star were captured and reflected in the appellant's RHB bank statement. The said documentary evidence proved that there were indeed advances of monies made among the parties. The transfers of monies were made instantaneously between parties and the transactions as well as the sum of monies involved were identical. It was clear to us that he has done investigation to ascertain the genuineness of Lismore's claim. In our view the sufficiency of his investigation before making any decision to admit or reject the POD is entirely his own function and not the court.

[34] The liquidator has done his investigations on Lismore's POD based on the documents relied on by him. In our view, the learned High Court judge failed to appreciate all the said documentary evidence. The court's finding that there was no proof that can be shown that the monies were received from Lismore and that the POD is unsubstantiated and the claim cannot be sustained as there was insufficient documentary evidence to back up the claim that Lismore had advanced the sum of RM4,018,398.88 was made based on a misunderstanding of facts and evidence adduced before it, which led the court to come to a conclusion contrary to solid contemporaneous documentary evidence.

[35] In the case of *Lim Chiew v Lee Chao Yong & Anor and another appeal* [2018] MLJU 956, the Court of Appeal acknowledged the liquidator's findings and found that it would not be right for the High Court judge to interfere with the same because the liquidator had produced documentary evidence:

> [49] *Therefore, the learned judge's finding that the genuineness of Lim Chiew's claim cannot be sustained since the liquidator only relied on the statement of claim in Suit 123 as proof of his alleged debt, is thus erroneous since she has ignores documentary evidence produced by the liquidator. Investigation was done by the liquidator and particulars of his investigation were well documented.* As can be seen in his affidavit at para 8.4 referred to in paragraph 48 above, he took into consideration that the petitioner Lim Chiew has made various payments by cheques to the respondent Siteman amounting to RM7,5000.000 and these payments by cheques are exhibited in exh 'S4'.

[36] We found the above case strongly supports the appellant's appeal in that the said documentary evidence was obtained by the appellant's liquidator through an independent and thorough investigation. The particulars of his investigation were also documented. Similarly, the court below did not judicially appreciate the said documentary evidence which carries a high probative value.

[37] In the case of *Barnden (Liquidator), Re Masonry Works Pty Ltd (in liq)* [2020] FCA 575 cited by the appellant's learned counsel, at para 14, it was held that the liquidator of Masonry Works Pty Ltd (company in liquidation) was justified in admitting to proof on the liquidation of the company the claim by Masonry Profiles Pty Ltd (in liquidation) in an amount of $505,942.77 as there was a detailed and thorough investigation which had formed the basis of the liquidator's determination. It was held that:

> [14] The liquidator has conducted thorough investigations into the discrepancy of the loan amount. Those investigations included:
>
> (1) examining the financial records of the company and profiles;
>
> (2) reviewing the general ledgers of each of the company and profiles;
>
> (3) reviewing bank statements for each of the company and profiles; and
>
> (4) identifying and reconciling mutual debits and credits between the company and Profiles from the ledgers and accounts.
>
> [15] There is no loan agreement or other document recording the terms of the loan from Profiles to the company. The liquidator has been able to identify reciprocal debits and credits for 51 transactions between the companies on the period 2 January 2013 to 31 August 2014. Five of these are supported by bank statements.

[38] The *Barnden* case is in all fours with the present case. In summary, the

investigations conducted by the appellant's liquidator before admitting Lismore's POD are as follows:

(a) applying accounting principles in matching and examining the bank statements produced by Lismore and appellant regarding the transactions. The amount of monies transferred from Lismore to the respondent matched the amounts received by respondent in its RHB bank account in 2011;

(b) by requesting for all credit notes/documents relating to the telegraphic transfers to support the admission of the POD;

(c) by examining and checking the alleged 12 cheques payments made by the respondent to Arctic Star as advances from Lismore;

(d) by examining the relevant accounting record of the respondent such as the general ledger which show that the 12 advances to Artic Star were duly recorded;

(e) by examining the appellant's POD that was already admitted by Artic Star, and in the event Artic Star pays the said sum either in full or in pari passu to the respondent;

(f) by examining and reconciling the entries in the appellant's ledger that shows receipts of the advances from Lismore;

(g) by reviewing the admission of the appellant's POD by Artic Star's liquidator, one Mr Lim San Peen from PWC; and

(h) by interviewing the financial controller of the WTK Group, one Madam Loh Leh Fong to ascertain the trail of how the advancements was made.

(collectively 'the said investigations')

[39] We are satisfied that the purported advances of monies indeed took place. The appellant's liquidator came to his decision after the said investigations. The liquidator had applied the correct accounting principles toward the transaction documents and contemporaneous evidence of the appellant before allowing Lismore's POD. In our considered view the learned High Court judge was wrong in his findings that the appellant liquidator had ignored the fact that there were lack of supporting documents and that there was a failure on the part of the liquidator to ascertain the genuineness of Lismore's claim.

[40] The liquidator in discharging his role in the present company liquidation was equipped with the necessary qualification, skill and ethics. We agree with the respondent that the duty of the liquidator was to act impartially and to draw the attention of the court to facts and matter which were material for the court's consideration. This was held in the Federal Court case of

Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709 where the Federal Court was critical when the trial judge had relied on the liquidator who, seemed to have sided with the respondent where the liquidator had failed to consider the appellant's right, ie her right to share in the company surplus assets. Mohamed Dzaiddin FCJ (as he then was) observed at p 719 that the liquidator should maintain an even and impartial hand between all individuals whose interests are included in the winding up. He should have no leaning for or against any individual whatsoever. We agree with the view that a person who holds the status of liquidator, or any persons or its like, whether or not appointed by court, for reward, has a high standard to meet. The court will interfere with the decision of the liquidator when the circumstances or the facts warrant it such as the present.

[41] However, the circumstances or the facts do not warrant it in the present scenario. In fact, we are guided by the Singapore Court of Appeal case of *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* [2009] 4 SLR 458, at pp 468–469 (ABOA, Tab 5) which held as follows:

> Although a liquidator 'is not bound to admit' any proof of debt which, if admitted, would affect the interests of creditors and contributories, he is only bound to take extraordinary steps to scrutinize a proof of debt on the basis that it could be a false claim in cases where he has reason to be suspicious about its genuineness or legal validity. *Factors to be considered include, inter alia, the origins of the debt, the length of time the debt has been due, how the company has treated the debt in its financial statements, the business of the debtor company and, where relevant, the relationships between the claimants and the controlling shareholders of the company*. In assessing these factors, the liquidator must rely on: *(a) knowledge of the general principles of company accounting; (b) the auditing practice of companies by independent auditors; (c) the effect and implication of directors' and shareholders' approvals annually of company accounts made in compliance with the law; (d) the customary insolvency practice in verifying debts; and (e) some degree of common sense in understanding human relationships*. In taking into account these matters, he should also apprise himself of the nature of the business of the company, and other facts peculiar to the company in liquidation. *In the case of the present company, the relationship between the directors and the shareholders, inter se, is obviously a relevant factor to be considered.*
>
> [21] *Therefore, although a liquidator has a duty to scrutinize all proofs of debt, the level of scrutiny required by the liquidator to discharge this duty must, in the final analysis, depend on the circumstances of the case*. In the present case, OSH rejected FCL's proof only because it could not produce the related primary documents, even though FCL had explained that they had been destroyed or lost due to effluxion of time. This was not an unbelievable reason since the claimed debt was originally acknowledged by the Company as far back as January 1995, more than 9 years before the Company was wound up. OSH was aware that under Hong Kong law, FCL was not obliged to preserve indefinitely the related documents concerning a debt due to the Company (which is, in any case, from a related company or at least part of a group of companies controlled by NCL and his family). OSH was also aware that FCL's

proof of debt was a debt that the Company itself had consistently acknowledged as owing in its own annual accounts, which had been approved by the WSW qua director and shareholder. In our view, although a liquidator has the power to look behind the audited financial statements and audit confirmations, a creditor's proof of debt should not be lightly rejected if the debt has been consistently acknowledged in audited accounts and or through audit confirmation statements. Such acknowledgments amount to an admission of the debt. Furthermore, a long effluxion of time inevitably creates evidential difficulties, as in the present case. Witnesses may be difficult to locate or may not be able to recollect essential details, and some may even become uncooperative. The relevant primary documents can also be destroyed or lost through the passage of time. In essence, while we accept that the burden of proof ordinarily rests on the creditor to substantiate a proof of debt this does not mean that the only means by which a creditor can prove a proof of debt must be through the production of primary documents.

[42] We agree with the appellant that in this case the relationship between the subsidiaries in the WTK Group is a relevant factor in proving that the said sum is an advancement. The lack of a director's resolution does not mean that such an advancement cannot be made. In any event, transactions of monies advanced were reflected in contemporaneous documents and it is undeniable that monies advanced were transmitted to Artic Star through the appellant. Further, we agree that the admission of the appellant's POD by Artic Star's liquidator is undeniable proof of the existence of the arrangement for such an advancement by Lismore and this was not denied nor disputed by the respondent

[43] Following the principles in *Fustar* and *Barnden* alluded to earlier, Artic Star's liquidator (similar to the appellant's liquidator) had a duty to scrutinize the appellant's POD judiciously. With respect, the admittance of the appellant's POD can only mean that Lismore's POD ought to be admitted. It is also pertinent to note that the respondent had not added Artic Star or Lismore as a party in her application to reverse the appellant's liquidator's decision. We find it is strange for the High Court not to rule that the respondent's action in not disputing the admission of the appellant's POD by Artic Star amounts to an admission and knowledge of such advancement.

[44] In the circumstances, we find that the liquidator had duly discretion a thorough and sufficient investigation and exercised his discretion corerctly in admitting Lismore's POD. We are also satisfied that the liquidator is justified in admitting the claim by Lismore in the sum of RM4,018,389.88 following a detailed and thorough investigation.

[45] Another plain error committed by the learned High Court judge is when he held that Loh Leh Fong @ Loh Leh Pong is not the financial controller of Lismore nor was she responsible for the accounts and finance of Lismore. As

such, the claim by her that the respondent is indebted to Lismore is entirely questionable and not reliable. The learned judge, in our view, clearly failed to appreciate the evidence provided by Madam Loh on the practices of appellant, Lismore and Artic Start as part of the WRK Group of Companies. Therefore, the finding by the learned High Court judge that Madam Loh evidence was entirely questionable and not reliable in our view is without basis.

[46] The averments in Madam Loh's affidavit dated 3 January 2019 reveal that Madam Loh had been working with WTK group for the past 29 years; that she was promoted to financial controller in year 2007; that her duties were to oversee the accounts and finance of several companies of WTK group of companies including the applicant, Lismore and Artic Star. The learned judge had failed to consider these facts. Further, Madam Loh had previously supervised the accounts of the appellant and worked under the late WKN. She therefore had personal knowledge of the nature of the arrangement as to why the said RM4,018,389.88 was transferred to the appellant in 2011, ie, to be further advanced to Artic Star. According to Madam Loh, the Financial Controller of some of the companies under the WTK Group (including the appellant), Artic Star was in need of capital for its plantation business in 2011.

[47] The facts reveal that the appellant and Arctic Star were all run by and/or connected to the WTK's family as part of the WTK Group. We agree with the appellant's contention that it is not uncommon for an arrangement for the advancement of monies to be made among the entities. In our considered view, the lack of written resolutions or written agreements does not mean that such an arrangement is improper as held in *Barnden*. Had the learned High Court judge judicially appreciated Madam Loh's affidavit evidence, he would not have arrived at his finding on Madam Loh's credibility.

[48] The learned High Court judge has made a conclusion that the appellant liquidator 'has not exercised his discretion bona fide and he has acted in a way in which no reasonable liquidator would have acted', and that he 'has made errors of law' and 'did not address the relevant questions' as well as 'failed to consider the relevant factors'. We agree with the appellant and with the reasons given that we have alluded to earlier, that these findings cannot be correct. The appellant's liquidator in fact had acted in accordance with established principles enunciated in *Fustar* and *Branden.*

[49] We agree with the appellant's submission that the learned High Court judge did not make any specific findings to support his decision that the appellant's liquidator was wrong to admit Lismore's POD, the reason being that the respondent adduced no evidence to contradict the appellant's contemporaneous documentary evidence. The onus of establishing that a proof of debt was improperly admitted rests on the person who makes this

assertion, in this case it is the respondent (see *McPherson's Law of Company Liquidation* (3rd Ed, Sweet and Maxwell 2013) at pp 12–064, ABOA, Tab 6). In the absence of such evidence to the contrary, surely the learned High Court judge lacked both factual and legal basis to meet the high threshold test to interfere with the appellant liquidator's decision to admit Lismore's POD.

[50] The threshold test is that the court should be slow to interfere with any act or decision of the liquidator in discharging his role in company's liquidation particularly in matters involving the admission or rejection of proof of debt which involve commercial considerations. The court can only interfere in very exceptional circumstances when the liquidator has acted in utter unreasonableness.

[51] In *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* Zulkefli CJM had this to say at p 639:

> [24] *Based on the above principles of law, we are of the view that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way*. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator (see the case of *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor* [2007] 2 MLJ 12).

See also: *Re Edennote Ltd; Tottenham Hotspur plc and others v Ryman and another* [1995] 2 BCLC 248, *Re Equity Funds of Australia (in liq)* (1976) 2 ACLR 238.

[52] The recent case of *Tan Kim Tian & Anor v Tan Kim Chuan & Anor* [2020] MLJU 86 took a similar approach as the cases mentioned above. In addition, the Court of Appeal held at para 31 that:

> [31] The Court will have to see if liquidator's action has such importance and can be seen to have *such defects as to justify the court exercising its supervisory power* where *'a defect arising either out of some want of good faith or out of some erroneous approach in law or in principle then that it clearly a ground on which the court would entertain an application by one of the interested parties for appropriate direction or some other form of remedial order'.*

[53] As explained in the above paragraphs, the appellant's liquidator acted in accordance with the principles in *Fustar* and *Barnden*. The respondent also tendered no evidence to show that the admission of Lismore's POD was made in bad faith or out of some erroneous approach in law. This is a clear-cut case where the respondent is unable to meet the threshold in *Wong Sin Fan*. Hence, the learned High Court judge ought not to have interfered with the appellant liquidator's decision insofar as Lismore's POD is concerned. Further, in the absence of evidence of fraud or bad faith, there is simply no reason for the

learned judge to find that the appellant's liquidator had acted in a manner that was so utterly unreasonable and absurd that no reasonable man would have done it.

CONCLUSION

[54] We are satisfied that there are merits in the appellant's appeal. There is a clear misdirection by the learned judge which has occasioned a miscarriage of justice, hence, it warrants this court to interfere and correct the High Court mistake. It is our unanimous decision that the appeal is allowed with cost of RM15,000 here and below subject to allocator. The High Court decision is set aside and the decision by the liquidator in admitting Lismore's POD is reinstated.

Appeal allowed with costs of RM15,000 subject to allocator and decision of High Court set aside.

Reported by Mohd Kamarul Anwar